APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16431 SEPTEMBER TERM 1967 — APRIL SESSION 1968

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICHARD HAUFF, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MAY 27, 1968

Before HASTINGS, *Chief Judge,* DUFFY, *Senior Circuit Judge* and CASTLE, *Circuit Judge.*

DUFFY, *Senior Circuit Judge.* The indictment herein contained five counts charging defendant with violations of Title 18 U.S.C. § 1343, which prohibits the use of interstate wire communications in the course of a scheme or artifice to defraud.

Defendant was found guilty by a jury on all counts and was sentenced to a term of three years on each count, to be served concurrently with each other, and consecutively with an earlier sentence of three years for violation of the conflict of interest statute, which judgment of conviction was, at that time, on appeal to this Court.

Defendant moved to dismiss the indictment, claiming a delay between the alleged offense and the return of the indictment prejudiced his defense contrary to his constitutional right to due process and a speedy trial. Prior

to the trial, defendant also moved that the prosecution be prohibited from impeaching him if he took the witness stand, by the use of his prior conviction which was pending on appeal in this Court.

Sidney Lederman and defendant Hauff first met in 1958 or 1959. In 1961, defendant told Lederman that he, Hauff, had an interest in a piece of land in Las Vegas, Nevada, on which he planned to build a hotel and casino. This plan or proposal was often referred to on the trial as the Continental Hotel project. Hauff asked Lederman if he would be interested in representing Hauff's business interests in this project. Two days later, Lederman told Hauff that he would be interested.

In order to decide the issues before us, it is not necessary to detail the many representations made by Hauff to Lederman which were proved on the trial to be false. There also is no dispute as to the various payments of money to Hauff by Lederman induced by the false promises of Hauff.

We shall first consider defendant's claim that the delay of more than two years from the discovery of the alleged facts of the offense to the time the indictment was handed down is contrary to due process of law and to the right of the defendant to have a speedy trial.

Defendant argues that as early as the fall of 1961, the Government was aware of the complaint by Lederman that the defendant had defrauded him in a Las Vegas hotel scheme. Defendant recalls that in July 1963, he called at the Chicago office of the FBI to tell them the transaction between Lederman and himself was a loan. The indictment was filed on November 15, 1965.

In order to show prejudice due to the pre-indictment delay, defendant asserted by affidavit that a Mr. Silver died on October 27, 1963, and that Silver had been a witness to parts of the indictment transaction, and that Silver would have corroborated defendant's testimony that his numerous dealings with Lederman were loan

transactions. Therefore, defendant argues, the trial court committed error in denying defendant's motion to dismiss the indictment.

The record before us contains no evidence of any meeting when Hauff, Lederman and Silver were present. The alleged meeting is not referred to on the cross examination of Lederman or in the direct examination of Hauff. It stretches credulity too far to believe that by some oversight reference to such an important meeting was entirely overlooked. The Court below, and this Court, are asked to rely solely on Hauff's self-serving affidavit.

When Hauff told the FBI that the transaction between himself and Lederman was a loan, he did not mention that Silver could corroborate his story. Had Hauff done this, the FBI would have interviewed Silver, and this interview would have been available to Hauff at trial. As a matter of fact, Hauff did not take any statement from Silver when Silver was alive. It is doubtful that Silver could have corroborated Hauff's story since no one took any statements from him during the investigation of the alleged crime.

This Court recently has considered a similar claim in *United States of America* v. *Deloney,* .... F.2d .... (No. 16090, January 25, 1968), cert. den. 36 L.W. 3423. We there referred to our previous decisions in *United States* v. *Panczko,* 367 F.2d 737 (1966) and *United States* v. *Evans,* 385 F.2d 824 (1967).

In *Deloney* we said: "We think we should concede that it is possible to conceive of a delay less than the period of the Statute of Limitations that would be so unreasonable and the prejudice to defendant so great, that relief under the Fifth Amendment should be afforded. But this is not the instant case, nor was any such case presented in Panczko or Evans."

The Government points out that the Federal Bureau of Investigation in this case was required to investigate

leads and hold interviews with many witnesses. Those transactions occurred in Chicago, San Antonio, Dallas, Los Angeles and North Hollywood. It claims it was reasonable that a lengthy investigation would be necessary.

A pertinent statement was made by the Court in *United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2 Cir., 1967): "Time consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons."

While the rule in this Circuit is that a trial court should dismiss an indictment because of pre-indictment delay if the accused proves he has been prejudiced, in this case, the defendant has not sustained his burden of proving that he has been prejudiced.

The second point urged by defendant is that error was committed by denying defendant's motion to require the Government not to refer, by way of impeachment, to defendant's conviction on which an appeal was then pending. Defendant frankly urges that we should overrule *United States* v. *Empire Packing Company, et al.*, 174 F.2d 16, 20 (7 Cir., 1949), cert. den. 337 U.S. 959 (1949).

The rule in *Empire* is that prior convictions on which appeals are pending are admissible for purposes of impeachment where the defendant takes the witness stand to testify in his own behalf. We there said: "Unless and until the judgment of the trial court is reversed, the defendant stands convicted and may properly be questioned regarding said conviction solely for the purpose of testing credibility." This principle was reaffirmed in *United States* v. *Hoffa, et al.*, 367 F.2d 698, 713-14 (1 Cir., 1966).

The defendant admits that the position of this Circuit is a majority view and that the position he espouses is the minority view. 16 ALR 3rd 726, 728, 735. While we decline to overrule the rule stated in *Empire* and *Hoffa*, we think the defendant in this case is in no position

to question the rule heretofore established since it was the defendant's attorney who introduced the prior conviction at the time defendant took the witness stand to testify in his own behalf at the trial.

The Government asked no questions of defendant regarding his conviction, and the Government prosecutor made no mention of same in his closing argument.

We hold the District Court properly denied defendant's motion to dismiss.

The judgment of conviction is

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, June 18, 1968

Before

Hon. Latham Castle, Chief Judge

Hon. F. Ryan Duffy, Sr., Circuit Judge

Hon. John S. Hastings, Circuit Judge

United States of America Plaintiff-Appellee No. 16431 vs. Richard Hauff Defendant-Appellant	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

SUPREME COURT, U.S.
Office-Supreme Court, U.S.
FILED
AUG 16 1968
JOHN F. DAVIS, CLERK

No. 294

In the Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD HAUFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Appendix, 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1968. A petition for rehearing was denied on June 18, 1968. The petition for a writ of certiorari was filed on July 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the delay between the date of the offense and petitioner's indictment violated petitioner's right to due process.

2. Whether the trial court properly ruled that a conviction then pending on appeal could be admitted against petitioner for purposes of impeachment.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of Illinois, petitioner was convicted on a five-count indictment charging fraud by wire in violation of 18 U.S.C. 1343. Petitioner was sentenced to concurrent terms of imprisonment for three years on each count. The court of appeals affirmed (Appendix 1a-5a).

The government's evidence established that in the fall of 1959 petitioner hired an architect to render schematic drawings for a hotel in Las Vegas which were to be used for fund-raising purposes (Tr. 35-36, 40).[1] In the winter of 1961, petitioner encountered a former acquaintance, Sidney Lederman, to whom he outlined plans for the Continental Hotel (Tr. 74-75, 77). Petitioner related that, due to financial difficulties he was encountering with another enterprise, the Mount Prospect Country Club in Chicago, he was in need of funds for the financing of the hotel. Peti-

[1] "Appendix" refers to the opinion of the court below appended to the petition; "Tr." refers to the transcript of the trial proceedings, a copy of which we are lodging with the Clerk of this Court. "P.A." denotes the appendix of petitioner previously filed with the Clerk.

tioner falsely told Lederman that he had already placed $100,000 down on the property,[2] and that the remainder of the $240,000 purchase price was to be financed through a mortgage which was to be obtained through a friend, Carl Howard, a Los Angeles savings and loan executive.[3] Petitioner told Lederman that, if he invested in the hotel, he would receive a share in the corporation (Tr. 77-78, 80, 81, 88, 89, 136). Several days after the discussion with petitioner, Lederman flew to San Antonio to meet with him, viewed the land allegedly owned by petitioner, and gave petitioner $4,000 (Tr. 78-79, 84). Although petitioner gave Lederman a promisory note for $20,000, Lederman testified that this was not intended to be a genuine loan transaction, but was merely a sham to impress another individual who was present with the sound financial backing of the venture (Tr. 84-85, 251, 252).

Thereafter Lederman wired petitioner five money orders—which formed the basis for the indictment—in the amounts of $2,000, $750, $700, $250, and $750 (Tr. 90, 94, 116, 117-118, 119). In addition, Lederman advanced to petitioner another $12,000, from time to time in connection with the venture (Tr. 92, 113-114, 182, 195, 417, 281-282). Lederman became suspicious when petitioner's personal checks began to

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[2] Petitioner also told the architect that he had obtained a parcel of land (Tr. 37).

[3] Howard testified he had never been a savings and loan executive (Tr. 229, 230) and knew nothing about a $35,000 check petitioner had caused Lederman to send to him, purportedly in connection with obtaining the mortgage (Tr. 88, 124-126, 224-227).

bounce (Tr. 101) and the start of construction on the hotel was delayed time after time (Tr. 109). Lederman then approached petitioner and indicated his misgivings about the entire venture. Petitioner, who was in the army, then suggested that Lederman draw up an account of the money invested and said he would attempt to give back part or all of the money (Tr. 115-116). Petitioner never returned any of the funds to Lederman (Tr. 116).[4]

Petitioner testified in his own defense and categorically denied having ever spoken to Lederman concerning the Continental Hotel venture (Tr. 385-386, 422). He testified that the money he received from Lederman constituted a loan to cover personal expenses pending the disbursement of funds at the conclusion of a bankruptcy proceedings involving the Mount Prospect Country Club (Tr. 384-388, 417).

ARGUMENT

1. The investigation into the transactions involved herein was commenced by Mr. Lederman's complaint to the F.B.I. in 1961, and petitioner was informed of the pendency of the investigation in October 1961 (Tr. 415-416; P.A. 22). On November 1, 1965, the grand jury returned an indictment, filed November 15, 1965, charging petitioner with the offenses of which he was convicted (Appendix 2a). Petitioner's pretrial motion to dismiss the indictment on the grounds

[4] Lederman's testimony was corroborated in pertinent detail by that of his wife (Tr. 275-292), and further supported by the testimony of petitioner's company commander (Tr. 300, 302-303) and by Carl Howard (Tr. 218-219, 224-226).

of undue and prejudicial delay in bringing the charges was denied by the district judge (P.A. 21, 26).

The traditional safeguard against unreasonable delay in the pre-arrest, pre-indictment period has been the relevant statute of limitations. See *United States* v. *Ewell*, 383 U.S. 116, 122; *Harlow* v. *United States*, 301 F. 2d 361, 366 (C.A. 5), certiorari denied, 371 U.S. 814; *Foley* v. *United States*, 290 F. 2d 562, 565 (C.A. 8), certiorari denied, 368 U.S. 888; *Hoopengarner* v. *United States*, 270 F. 2d 465, 468-469 (C.A. 6). Some jurisdictions have departed from this rigid rule, but only on a clear demonstration of prejudice flowing from the delay or a showing that the delay was purposely caused by the government. See *e.g.*, *United States* v. *Feinberg*, 383 F. 2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044; *United States* v. *Deloney*, 389 F. 2d 324 (C.A. 7), which partially overruled prior holdings in *United States* v. *Evans*, 385 F. 2d 824 (C.A. 7), and *United States* v. *Panczko*, 367 F. 2d 737 (C.A. 7); *Ross* v. *United States*, 349 F. 2d 210 (C.A.D.C.); *Woody* v. *United States*, 370 F. 2d 214 (C.A.D.C.).

Petitioner is unable to establish either of these grounds. No contention is made that the government purposely delayed the initiation of the prosecution. The sole claim is that petitioner was prejudiced by the delay, because a witness who was material to the defense died before trial. In an affidavit (P.A. 22-23) filed in support of the motion to dismiss the indictment, petitioner said that the witness, Mr. Silver, was present with petitioner and Mr. Lederman on

one occasion when Lederman delivered money to petitioner and would corroborate petitioner's assertion that the monies which changed hands constituted a loan, not an investment in the Las Vegas hotel venture. Both the district court and the court of appeals found this "self-serving affidavit" unconvincing in light of the other facts of record.

As early as October 1961, petitioner was apprised of Lederman's complaint to the F.B.I. and in July of 1963 petitioner visited the Chicago office of the F.B.I. and related his version of the transactions (Tr. 415-416). No mention was then made of the existence of Mr. Silver, or the fact that he could corroborate petitioner's story. Despite the crucial nature of Silver's alleged testimony, petitioner never attempted to apprise the F.B.I. of its substance nor to preserve the testimony in any form. Indeed, despite extensive cross-examination, Lederman never testified that Silver was present at any meeting between himself and petitioner and petitioner himself never testified to Silver's presence at any meeting between petitioner and Lederman. As the court below commented, "It stretches credulity too far to believe that by some oversight reference to such an important meeting was entirely overlooked." (Appendix 3a).

Moreover, in the circumstances of this case the delay was reasonable. It is apparent from the record that this was but one corner of a much larger web of fraud in which petitioner was engaged. This particular set of transactions ranged from Chicago to Dallas and from San Antonio to Los Angeles and many witnesses had to be interviewed in these locations in

preparation for this prosecution. As this Court noted in a similar context in *Hoffa* v. *United States*, 385 U.S. 293, 310: "There is no constitutional right to be arrested" at a particular time; it is not for the judiciary to determine at precisely what juncture the authorities have sufficient evidence in their possession to successfully prosecute. Petitioner has no cause to complain. After petitioner visited the F.B.I. in July 1963 it seems likely that the F.B.I. devoted substantial time delving into the background of the hotel venture and the bankruptcy, as well as petitioner's financial condition in an effort to ascertain the accuracy of petitioner's representation that he was erroneously accused.

2. Prior to trial, the court denied a defense motion that the government be precluded from impeaching petitioner by reference to a conviction which was then before the court of appeals (Tr. 31-32). When petitioner took the stand, the fact of conviction was elicited by defense counsel on direct examination. Petitioner's argument that such a conviction may not be used for impeachment was properly rejected by the trial court. As observed by the court below, quoting from its opinion in *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959, reaffirmed in *United States* v. *Hoffa*, 367 F. 2d 698, 713-714 (C.A. 7), remanded on other grounds, 387 U.S. 231, "Unless and until the judgment of the trial court is reversed, the defendant stands convicted and may properly be questioned regarding said conviction solely for the purpose of testing credibility" (Appendix 4a). The only other circuits which have

been confronted with this issue are in accord. See *United States* v. *Owens*, 271 F. 2d 425, 426 (C.A. 2), certiorari denied, 365 U.S. 874; *United States* v. *Cipullo*, 170 F. 2d 311 (C.A. 2), certiorari denied, 336 U.S. 946; *Bloch* v. *United States*, 226 F. 2d 185, 188 (C.A. 9), certiorari denied, 350 U.S. 948; cf. *Newman* v. *United States*, 331 F. 2d 968 (C.A. 8), certiorari denied, 379 U.S. 975.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1968.

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[5] The cases from the District of Columbia Circuit (*Campbell* v. *United States*, 176 F. 2d 45 (C.A.D.C.); *Beasley* v. *United States*, 218 F. 2d 366 (C.A.D.C.), certiorari denied, 349 U.S. 907; *Fenwick* v. *United States*, 252 F. 2d 124, cited by petitioner, do not reflect a conflict within the circuits, for those decisions arose out of the interpretation of a statute (14 D.C. Code 305) peculiar to the District of Columbia, a factor specifically noted by the court in its most recent decision. See *Fenwick* v. *United States*, *supra* at 126 n. 3.

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